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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1000

DR. DALLAS MOORE,

Petitioner,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA;
J. DAN WHITE, Sheriff of Seminole County, Georgia,
Individually, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

DR. DALLAS MOORE,
Petitioner,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA; J. DAN WHITE, Sheriff of Seminole County, Georgia, Individually, etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 20, 1972.

CITATION TO OPINIONS BELOW

The order and judgment of the District Court for the Middle District of Georgia sustaining Respondents' motion for summary judgment are printed in Appendix B hereto and are unreported. The affirmance without

opinion of the judgment of the District Court by the Court of Appeals is printed in Appendix A hereto and is unreported.

JURISDICTION

The affirmance without opinion by the Court of Appeals, printed in Appendix A hereto, was entered on October 20, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1. May a district court grant summary judgment when no time was ever fixed for the hearing of the motion as provided under Rule 56(c), Federal Rules of Civil Procedure?

2. Did the pleadings before the District Court show on their face that the cause of action asserted in Petitioner's complaint was res judicata?

3. Did the moving party in the District Court carry its burden of showing the absence of any genuine issue of fact?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The statutes involved are: 28 U.S.C. §1331, 28 U.S.C. §§1343(3) and (4), and 42 U.S.C. §§1981, 1982, 1983, 1985 and 1988; 28 U.S.C. 2201.

The constitutional provisions involved are the equal protection and due process clauses of the 14th Amendment and 13th Amendment of the Constitution of the United States.

The Rule involved is Rule 56(c), Federal Rules of Civil Procedure.

STATEMENT

This case arose out of a proceeding in the Superior Court of Seminole County, Georgia, in Civil Action No. 1841-A. It was an *in rem* condemnation proceeding brought by the respondent, State Highway Department of Georgia, on July 28, 1971, against certain lands, improvements and trade fixtures, and the petitioner and Merchants and Farmers Bank as owners and condemnees.

An order of condemnation was entered by the Superior Court of Seminole County, Georgia, on July 28, 1971, wherein the Court set the date of hearing for petitioner to show cause why the condemnor's request for immediate possession should not be granted.

On September 4, 1971, after presentation and argument in the Superior Court, a continuance was granted until September 7, 1971. On September 7, 1971, after hearing, the Superior Court entered its judgment directing the delivery of possession by petitioner to the State Highway Department on September 22, 1971, and directing payment to petitioner by the clerk of the court of the funds on deposit as adequate and just compensation.

The petitioner filed a complaint in the United States District Court for the Middle District of Georgia, Thomasville Division, on September 20, 1971. In his complaint the petitioner alleged, in essence, that the respondents conspired unlawfully to deprive him of his civil rights by abusing the power of condemnation vested in them by State law. The petitioner prayed that the district court enter an order vacating and staying the judgment of the Superior Court of Seminole County, Georgia, entered September 7, 1971. On September 20, 1971, the petitioner also filed a motion for a temporary restraining order and for a preliminary injunction. After a hearing on this motion by the District Court in Columbus, Georgia, on September 21, 1971, this motion was denied.

Respondents answered the petitioner's complaint and denied any unlawful conspiracy or deprivation of his civil rights. On December 10, 1971, the respondents filed a motion for summary judgment. The motion was based upon the defense of res judicata and that they were entitled to a judgment as a matter of law. The district court granted this motion by its order of January 6, 1972. Judgment was entered thereon, January 21, 1972. On appeal, the Court of Appeals, on October 20, 1972, affirmed without opinion.

Jurisdiction in the court of first instance was invoked pursuant to the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1343(3) and (4), 28 U.S.C. 2201 and 42 U.S.C. 1983.

REASONS FOR GRANTING THE WRIT

I

The Courts Below Exceeded Their Jurisdiction In Granting And Affirming Summary Judgment Because No Time Was Ever Fixed For The Hearing Of The Motion As Provided Under Rule 56(c), Federal Rules Of Civil Procedure (FRCP)

Rule 56(c), provides, in part, "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." The Fifth Circuit has interpreted Rule 56(c) as requiring notice to the adverse party and a hearing on a Motion for Summary judgment. *See Georgia Southern And Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 373 F.2d 493, 496-498 (5th Cir. 1967). *Enochs v. Sisson*, 301 F.2d 125, 126 (5th Cir. 1962). In the instant case, petitioner was never notified of a time fixed for the hearing of respondents' motion for summary judgment; therefore, the order and judgment entered by the district court sustaining the Motion, without proper notice and hearing as required by Rule 56(c), was an abuse of that Court's discretion and exceeded its jurisdiction and thus should not have been affirmed by the Court of Appeals. *See Georgia Southern, supra,* at 497; *Enochs, supra,* at 126. This Court should review the decision below to speak to this derogation of Rule 56(c), FRCP, in the Fifth Circuit.

II

The Courts Below Erred In Granting And Affirming Summary Judgment Because The Pleadings Did Not Show On Their Fact That The Cause Of Action Asserted In Petitioner's Complaint Was Res Judicata.

The respondents moved for summary judgment in the district court "... because the complaint fails to state a claim upon which relief can be granted, in that it appears on the face of the pleadings that the action is res judicata ..." The action which respondents alleged to be res judicata was an in rem condemnation proceeding brought by the State Highway Department of Georgia against "3.202 acres of land; and Dallas Moore and Merchants & Farmers Bank" as owners and condemnees. The action which petitioner's complaint asserted was, however, an entirely different and independent federal cause of action against state officials invoking the original jurisdiction of the district court pursuant to the provisions of 28 U.S.C. 1331 and 28 U.S.C. 1343(3) and (4), 28 U.S.C. 2201, and 42 U.S.C. 1983, which provides a civil action against every person who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws. The complaint further asserted that the action was brought to redress the deprivation of rights, privileges and immunities secured by the equal protection and due process clauses of the 14th and 13th Amendments of the Constitution of the United States, 42 U.S.C. Sections 1981 (Equal rights under the law),

1982 (Property rights of citizens), 1983 (Civil action for deprivation of rights), 1988 (Proceedings in vindication of civil rights), and other laws of the United States providing for the equal rights of citizens within the United States.

Petitioner was not required to assert this federal right of action in the in rem State Court Condemnation proceedings. *See Monroe v. Pope*, 365 U.S. 167, 5 L.Ed. 2d 492 (1961). Section 1983 authorizes the federal courts to protect rights "secured by the Constitution and laws". *Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142, 196 (1970). The standards governing the granting of relief under Section 1983 are to be developed by the federal courts in accordance with the purposes of the Statute and as a matter of federal common law. Id. And, in *Lynch v. Household Finance Corp.*, 31 L.Ed.2d 424 (1972), this Court stated, "... the Congress that enacted the predecessor of §§1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law." In Georgia, there is no adequate state remedy for the right of action asserted in petitioner's complaint. And, even if there were, it has been held that the federal remedy provided by 42 U.S.C. 1983, "... is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See Monroe v. Pope*, 365 US 167, 5 L.Ed.2d 492, 503. Thus, that state law, if enforced, could have provided relief is not a bar to a federal court action under Section 1983 for alleged violation of constitutional rights under the equal protection clause of the 14th Amendment.

Petitioner's complaint alleges that the respondents, State Highway Department of Georgia, Hugh Broome, Chairman of the State Highway Department of Georgia, their agents and employees, individually and in their official capacities, conspired unlawfully to deprive appellant of his civil rights because of his race by abusing the power of condemnation vested in them by the laws of the State of Georgia. In *Monroe, supra*, this Court decided that 42 U.S.C. 1983, gives a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position. 365 US 167, 5 L.Ed.2d 492, 497.

That the State of Georgia itself, through its Highway Department and the Department's officials, is a party to the civil rights deprivations of which petitioner complains, underscores that it would have been futile for appellant to ask the State to redress his civil rights deprivations, and points to the reason 42 U.S.C. 1983, provides a supplementary and independent right of action which can not be foreclosed by any failure to assert it in an in rem state court condemnation proceeding. Hence the purposes of 42 U.S.C. 1983, are to: (1) Override certain kinds of state laws; (2) Provide a remedy where state law is inadequate; and (3) Provide a federal remedy though the state remedy, adequate in theory, is not available in practice. *See Monroe, supra*, 5 L.Ed.2d 492, 498.

Thus this Court should review the decision below granting summary judgment, because the pleadings neither show on their face that the cause of action asserted in petitioner's complaint is res judicata nor

the absence of any genuine issue of fact, and petitioner is entitled to a trial on the substantive issues of his complaint.

III

The Courts Below Erred In Granting And Affirming Summary Judgment Because The Moving Party Failed To Carry Its Burden Of Showing The Absence Of Any Genuine Issue Of Fact.

The District Court "... concluded that the Defendant's motion for summary judgment should be sustained for all of the reasons set forth in said motion." The reasons set forth in the motion were, "the complaint fails to state a claim upon which relief can be granted, in that it appears on the face of the pleadings that the action is res judicata ..." Petitioner's verified complaint and affidavit attached thereto contain factual allegations supporting a claim that the respondents therein, their agents and employees, conspired, under color of law, custom, or usage, to deprive appellant of statutory and constitutional rights, privileges, and immunities, by abusing the power of condemnation vested in them by the laws of the State of Georgia. Respondents totally failed to deal with these issues in their motion for summary judgment. Thus petitioner contends the Court below erred in granting said motion because the respondents failed to carry their burden of showing the absence of any genuine issue of fact. Respondents' motion for summary judgment dealt solely with the question of res judicata.

Respondents' motion for summary judgment on the basis of res judicata and the brief in support thereof failed to dispute the allegations in petitioner's verified complaint with affidavit attached that the respondents conspired under color of state law, custom, or usage to deprive him of his civil rights. Petitioner contends that the facts alleged in his verified complaint and affidavit created substantial enough possibility of a conspiracy to allow him to go to trial, especially after appellees failed to offer counter affidavits to show that no conspiracy existed. *See Adickes v. Kress*, 398 U.S. 144, 26 L.Ed.2d 142.

Respondents did not carry their burden of showing no genuine issue of fact. They failed to make any effort to foreclose the possibility that there was a conspiracy to abuse the power of condemnation vested in them by the laws of the State of Georgia. *See Adickes, supra*, 26 L.Ed.2d 142, 154. None of the respondents submitted an affidavit to foreclose the possibility he participated in the alleged conspiracy. And "[b]ecause [o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion," respondents' failure to show that there was no conspiracy requires reversal. *Adickes, supra*, 26 L.Ed.2d 142, 155.

When respondents made their motion for summary judgment, it was not incumbent on petitioner to come forward with any additional affidavits asserting a conspiracy because, under Rule 56(c), the burden was on the moving party to show initially the absence of a

genuine issue concerning any material fact. *Adickes, supra,* 26 L.Ed. 142, 155. And because respondents did not submit any evidence in support of their motion to establish initially the absence of a genuine issue, the district court should have denied the motion "even if no opposing evidentiary matter [was] presented." *Adickes, supra,* 26 L.Ed.2d 142, 155.

After respondents did not, minimally, attempt to meet their initial burden of establishing the absence of the facts alleged to create a conspiracy, petitioner was not required to come forward with any suitable opposing affidavits, *Adickes, supra,* 26 L.Ed.2d 142, 155-156. Only after respondents had met their initial burden of showing that the facts upon which petitioner relied to support his allegation of conspiracy were not susceptible of the interpretation which petitioner sought to give them, would he have been required to do more than simply rely on the contrary allegations in his verified complaint and affidavit. *Adickes, supra,* 26 L.Ed.2d 142, 156. If the party moving for summary judgment fails to show that he is entitled to judgment under established principles, he is not entitled to judgment; and no defense to an insufficient showing is required. *See Adickes, supra,* 26 L.Ed.2d 142, 156. The Courts below erred in granting summary judgment because the moving party failed to carry its burden of showing the absence of any genuine issue of fact, and petitioner is entitled to trial on the substantive issues of his complaint.

CONCLUSION

For the reasons stated herein, it is imperative that this Court review the decision below.

CHEVENE BOWERS KING
Counsel for Petitioner

Of Counsel:

KING & PHIPPS
January — 1973

CERTIFICATE OF SERVICE

I, Chevene Bowers King, counsel for Petitioner, Dr. Dallas Moore, do hereby certify that I have this day served copies of the foregoing petition for a writ of certiorari upon the following counsel for the parties, at the addresses shown, under cover of sufficient postage to insure first class delivery: Julian Webb, Deputy Assistant Attorney General, Box 277, Donalsonville, Georgia 31745 and Arthur K. Bolton, Attorney General, 132 Judicial Building, Atlanta, Georgia 30334.

This ____ day of January, 1973.

Chevene Bowers King
Counsel for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1501

DR. DALLAS MOORE,
Plaintiff-Appellant,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA, J. DAN WHITE, Sheriff of SEMINOLE COUNTY, GEORGIA, Individually, etc., ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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(October 20, 1972)

Before TUTTLE, BELL and AINSWORTH, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA THOMASVILLE DIVISION

DR. DALLAS MOORE,

Plaintiff,

CIVIL ACTION

versus

No. 945

STATE HIGHWAY DEPARTMENT OF GEORGIA, et al.,

Defendants.

Filed: JAN. 7, 1972

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants in the case above identified have heretofore filed a motion for summary judgment and have filed a brief in support thereof. The Plaintiff has filed no response to said motion nor to the Defendants' brief.

The Court has given consideration to the pleadings and to the motion for summary judgment, and to the brief filed in support thereof, and has concluded that the Defendants' motion for summary judgment should be sustained for all of the reasons set forth in said motion. The Defendants' motion for summary judgment

is, therefore, sustained and counsel for the Defendants will prepare an appropriate form of judgment to be entered pursuant hereto.

IT IS SO ORDERED this 6th day of January, 1972.

J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE

A true and certified copy.
This January 7th, 1972.

JOHN P. COWART, CLERK
U. S. District Court
Middle District of Georgia
/s/ WILLIAM J. TROWELL
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

DR. DALLAS MOORE,

Plaintiff,

CIVIL ACTION

versus

No. 945

STATE HIGHWAY DEPARTMENT OF GEORGIA, et al.,

Defendants.

Filed: JAN. 24, 1972

JUDGMENT

The issues raised by the Defendants' Motion for Summary Judgment having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the relief sought by Plaintiff be and the same is hereby denied, that his complaint be and the same is hereby dismissed, and that Plaintiff pay the costs of this action.

SO ORDERED this 21 day of January, 1972.

J. ROBERT ELLIOTT
UNITED STATES
DISTRICT JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1000

DR. DALLAS MOORE,
Petitioner,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA; J. DAN WHITE, Sheriff of Seminole County, Georgia, Individually, etc., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Brief For The Respondents In Opposition

STATEMENT OF THE CASE

Respondents agree with the petitioner's statement of the case but would make the following additions.

In the district court on December 10, 1971, the respondents filed their motion for summary judgment and a memorandum of law in support thereof. The petitioner did not in any manner respond to this motion. He filed neither affidavits, memorandum of law nor a request for a hearing on said motion. The district court granted the

motion for summary judgment by its order of January 6, 1972.

The proceeding in the Superior Court of Seminole County, Georgia, out of which this case arose was a condemnation proceeding brought pursuant to Ga. Laws 1961 pp. 517 et seq. (Ga. Code Ann. §§ 36-1301 et seq.) to acquire fee simple title to a right of way for a certain State-aid road, which had been laid out as a part of the State Highway System of Georgia. The approval as to location for right of way acquisition on this project known as F-007-1(10) was given on May 22, 1967, by the Federal Highway Administration, a branch of the Department of Transportation of the United States.

THE QUESTIONS PRESENTED

1. Was the district court correct in not fixing a time for a hearing on a motion for summary judgment when counsel for the petitioner did not request a hearing pursuant to the local rules of that court?

2. Was the district court correct in granting summary judgment when it appeared from the pleadings that the cause of action as shown in petitioner's complaint was res judicata?

3. Was the district court correct in granting summary judgment when there was no genuine issue of material fact on the ground of res judicata?

4. Are there "special and important" reasons for granting a Writ of Certiorari in this case?

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN NOT FIXING A TIME FOR A HEARING ON A MOTION FOR SUMMARY JUDGMENT WHEN COUNSEL FOR THE PETITIONER DID NOT REQUEST A HEARING PURSUANT TO THE LOCAL RULES OF THAT COURT.

The petitioner contends that the district court exceeded its jurisdiction in granting respondents' motion for summary judgment because no time was ever fixed for a hearing. The petitioner does not contend that he had no notice of the motion nor that he did not have sufficient time to respond to the motion or to the memorandum of law submitted by respondents with their motion. The respondents filed with the district court and served upon petitioner their motion for summary judgment and their memorandum of law on December 10, 1971. The district court did not hand down its order on this motion until January 6, 1972. The order notes that the petitioner had made no response to respondents' motion nor to their brief.

Instead of replying to respondents' motion and brief the petitioner chose to remain silent. The district court was not given the benefit of petitioner's written argument, knowledge, or citation of authorities on the question of res judicata as raised in the motion for summary judgment. As was noted in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 863 (5th Cir. 1970), inaction on the part of a party must be considered in determining whether or not it was "heard" on a motion for summary judgment.

It is important to note that the petitioner might have had a hearing had he so desired. The District Court for the Middle District of Georgia has a local rule entitled "RULE AND ORDER OF COURT—MOTIONS AND BRIEFS". (Appendix A). This local rule reads in part, "(e) All motions shall be decided by the Court without a hearing unless otherwise ordered by the Court on its own motion, or in its discretion upon request of counsel." Undoubtedly, this local rule was adopted pursuant to Rule 78, Federal Rules of Civil Procedure and is quite similar to the local rules of other district courts. E.g., see Local Rule 8(d) of the United States District Court for the Northern District of Georgia. However, the record shows no request by petitioner that he be afforded a hearing as indeed no such request was made.

Rule 78 of the Federal Rules of Civil Procedure specifically provides that to expedite judicial business a district court may make an order "for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition." Eminent authorities have recommended dispensing with oral arguments on motions except in the most complicated cases. See, Proceedings of the Seminar on Procedures for Effective Judicial Administration, 29 F.R.D. 191, 301 (1961). In addition, this Court has held that oral argument is not required in order to constitute due process. *F.C.C. v. WJR*, 337 U.S. 265 (1949).

The petitioner has cited two cases to this Court which allegedly support his position that the district court exceeded its jurisdiction in granting the motion for summary judgment without a hearing or oral argument. Both cases cited are easily distinguished from the case sub judice. In *Georgia Southern and Florida Railway Co. v. Atlantic*

Coast Line Railroad Co., 373 F.2d 493, 497 (5th Cir. 1967), the Court stated, "The first indication that this material [oral testimony and affidavits] would be used to support a summary judgment was the judgment itself." (Matter in brackets added.) The facts of that case show that the opposing party was caught off guard, that he had no reason to suspect that a summary judgment was going to be ordered and, in essence, that he was without notice. However, in the case at bar, petitioner was afforded notice in that he was served with the motion for summary judgment clearly marked as such and a memorandum of law on the motion at least 26 days prior to the district court's order on the motion. During those 26 days petitioner chose to remain silent.

The second case which petitioner cites is *Enochs v. Sisson*, 301 F.2d 125 (5th Cir. 1962). In *Enochs*, the motion for summary judgment was served on the opposite party, but with no certificate of service of the motion. In a Per Curiam opinion the Court stated: "No time was ever fixed for the hearing of this motion, and it is undisputed that the trial court did not have any rule fixing such time. See Rule 78, F.R. Civ. P." However, the United States District Court for the Middle District of Georgia as we have seen does have a local rule pursuant to Rule 78, F.R. Civ. P., whereby a time for a hearing may be set if counsel so requests.

In the case at bar, the petitioner has requested that the actions of the district court and court of appeals be reviewed because no time for a hearing was fixed. It is interesting to note that the petitioner makes this request after he chose to remain silent in the district court, after he filed no response and no brief, and after he made no

request for a hearing, which hearing could have been available pursuant to the local rules of the district court.

The district court was correct in not fixing a time for a hearing when no hearing was requested by counsel.

II

THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT WHEN IT APPEARED FROM THE PLEADINGS THAT THE CAUSE OF ACTION AS SHOWN IN PETITIONER'S COMPLAINT WAS RES JUDICATA.

The cause of action raised by petitioner in his complaint filed in the district court is res judicata. In the Fifth Circuit, as elsewhere, a final decree rendered in a state court is conclusive in the federal courts, whether the question determined is one of federal, general, or local law. *Jarrard v. Southeastern Shipbuilding Corporation,* 163 F.2d 960 (5th Cir. 1947).

In *Elliott Advertising Co. v. Metropolitan Dade County,* 425 F.2d 1141, 1148 (5th Cir. 1970), it was held:

> "Under the doctrine of res judicata, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, *in substance rather than form,* between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but *as to every other matter which might with propriety have been litigated and deter-*

> *mined in that action*, regardless of whether questions of federal or state law are involved." (Emphasis added.)

Apparently, there is no argument that the Superior Court of Seminole County, Georgia, is a proper and competent jurisdiction in which to try an in rem land condemnation action against the petitioner. Ga. Laws 1961, pp. 517, 519 (Ga. Code Ann. § 36-1301 et seq.). The Georgia law under which the condemnation proceeding was instituted in the Superior Court of Seminole County provides in substance for the assertion of all rights which the petitioner asserted in his complaint to the district court. Ga. Code Ann. §§ 36-1303 (6); 37-709. Under Georgia law there is no need to bring a separate action in equity since the court in the condemnation proceeding has full jurisdiction to hear such matters. *State Highway Department v. McCurdy*, 217 Ga. 731, 124 S.E. 2d 630 (1962).

In the state court proceeding petitioner was afforded a hearing and oral arguments were heard. However, even though it was the proper time, *SHD v. McCurdy, supra*, the petitioner did not file any pleadings. Instead, he seeks to litigate in the federal courts those contentions which under state law could have been put in issue, in substance, before the state court where the judgment was rendered.

> "The doctrine of res judicata provides generally that, if a previous judgment is valid, final, and on the merits, it is an absolute bar in another case on the same cause of action between the same parties and their privies not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, *but also as to*

> *every ground of recovery or defense which might have been presented.*" (Emphasis added.) *Acree v. Air Line Pilots Assoc.*, 390 F.2d 199, 202 (5th Cir. 1968).

In addition, the United States Constitution, Article IV, Section 1, provides that the decree of the state court must be given the same full faith and credit as it would be entitled to in the state where rendered. *Jarrard v. Southeastern Shipbuilding Corp., supra.* In Georgia, the same full faith and credit to which a prior judgment would be entitled is set out as follows:

> "A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to *all matters put in issue, or which under the rules of law might have been put in issue* in the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside." (Emphasis added.) Ga. Code Ann. § 110-501; *Watkins v. Lawton*, 69 Ga. 671 (1882).

The petitioner in his complaint filed in the district court asked that court to vacate and stay a state court decision, that is in essence, to act in an appellate capacity to review the propriety of the state court decision.

> "The district court can not do this. The jurisdiction possessed by the District Courts of the United States is strictly original. 'A federal district court has no original jurisdiction to reverse or modify the judgment of a state court.' [Citations omitted]. Federal courts have no authority to act as an appellate arm of the state courts." (Matter in brackets added.) *Sitton v. United States*, 413 F.2d 1386, 1389 (5th Cir. 1969).

The Court of Appeals for the Fifth Circuit has held that a district court is "not permitted to reopen or set aside the final judgment or decree of a state court of competent jurisdiction, and any attempt to reopen or to relitigate the case must be made in the state court where the judgment was rendered." *Jarrard v. Southeastern Shipbuilding Corp., supra* at 961.

The petitioner cites the case of *Monroe v. Pape,* 365 U.S. 167 (1961), for the proposition that the remedy provided by 42 U.S.C. § 1983, need not be first sought and refused in the state courts before the federal remedy is invoked. The respondents do not here dispute that proposition, however, it is clearly not applicable to the case at bar. The petitioner is not starting fresh, he is not exercising an option and choosing the federal forum. The petitioner has been in a state court where his cause was or could have been heard and a judgment has been entered against him. In both *Monroe v. Pape, supra,* and *Adickes v. Kress,* 398 U.S. 144 (1970), the plaintiffs originated their cases in federal district courts, neither had actually sought relief in a state court. The Supreme Court of the United States was not considering a cause which had been appealed from a state trial court to a federal district court.

In *Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972), plaintiff sought relief in the federal courts under 42 U.S.C. § 1983 from a prejudgment garnishment under Connecticut state law. This Court was faced with the question of the applicability of 28 U.S.C. § 2283 which prohibits federal courts from granting injunctions to stay proceedings in a state court except in certain circumstances. It was expressly held that prejudgment garnishment under state law is not a proceeding in state court.

Thus, again there was no appeal from the state court to a federal district court as petitioner attempts in the case at bar.

The issues which petitioner sought to raise before the federal district court were issues which were or could have been substantively raised in the state court proceeding. Thus, the judgment of the state court has made these same issues res judicata before the district court and said court is without jurisdiction to entertain an appeal from a state trial court proceeding.

III

THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT WHEN THERE WAS NO GENUINE ISSUE OF MATERIAL FACT ON THE GROUND OF RES JUDICATA.

The respondents filed a Motion for Summary Judgment in the district court on the ground that the cause there pending was res judicata and that the respondents were entitled to a judgment as a matter of law.

The defense of res judicata is one peculiarily appropriate for decision by summary judgment. *Seaboard Coast Line Railroad v. Gulf Oil Corp.*, 409 F.2d 879 (5th Cir. 1969); *Moore v. Deal*, 203 F. Supp. 66 (E.D. Pa. 1962). In the case at bar the district court had before it the certified record of the proceedings in the state court. Those proceedings had been attached as exhibits to the pleadings of both petitioner and respondents. Specifically, the various elements necessary for the defense of res judicata, the prior judgment, jurisdiction, the cause of action, the parties, were all in the state court record which was before

the district court. Those things not readily apparent on the face of the state court record, such as what defenses could with propriety be raised in the state condemnation proceeding, are questions of state law of which the district court could take judicial notice. It was on these questions of law that respondents submitted their memorandum of law in support of their motion. Actually, there were no material facts on the question of res judicata outside the record from the state court. Thus, any affidavits by respondents on this point would have been superfluous.

If the petitioner disputed any material fact appearing in the record or if he questioned the law as respondents presented it to the district court, it would have been incumbent upon him to make such known to the court by affidavit or memorandum of law. However, the petitioner remained silent and allowed the motion for summary judgment to go unopposed in the district court.

The petitioner's allegations of a conspiracy to deny him his civil rights are allegations which obviously are not material to the defense of res judicata. Those allegations were decided or could have been decided in the state court, i.e., the abuse or misuse of any powers of condemnation vested in respondents by state law, Ga. Code Ann. §§ 36-1303 (6); 37-709, and are not matters for which it would be appropriate to submit affidavits relative to a defense of res judicata in the district court. The respondents vigorously deny any conspiracy and any deprivation of petitioner's civil rights and denied those allegations in their answer to petitioner's complaint.

The district court had before it in the record from the state court or could have been taken judicial notice of all the elements necessary for granting a summary judg-

ment on the ground of res judicata. Therefore, the respondents did all that was necessary in carrying their burden of showing the absence of a genuine issue of material fact on the defense of res judicata.

IV

THERE ARE NO SPECIAL AND IMPORTANT REASONS, AS SET OUT IN RULE 19 OF THIS COURT, FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE.

It should be noted that there are *no* issues in this case which are of general public importance. Indeed, no other persons, apart from petitioner and respondents, will be affected by the questions presented. This case turns upon its own special facts and is of consequence only to the particular parties. Here the petitioner seeks a hearing before the Supreme Court of the United States when he sought no such hearing before the district court. He asks for a consideration of the requirements of Rule 56 of the Federal Rules of Civil Procedure as to an oral hearing, when he made no effort to obtain such a hearing pursuant to the local rules of the district court, the awareness of which he acknowledged in oral argument before the Court of Appeals. In addition, petitioner sought to use the provisions of 42 U.S.C. 1983 to appeal a decision of the Superior Court of Seminole County, Georgia, in a land condemnation case, to the United States District Court.

The United States Court of Appeals for the Fifth Circuit saw fit to affirm the judgment of the district court without an opinion in accordance with their Local Rule 21. Thus, the Court of Appeals determined that an opinion in this case would have no precedential value.

The petitioner has not shown any conflict between the decisions of the various Courts of Appeal and indeed there are none on the questions petitioner would present to this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

This _____ day of February, 1973.

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Deputy Assistant
Attorney General

MARION O. GORDON
Assistant Attorney General

G. THOMAS DAVIS
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I have this day served three (3) true and correct copies of the foregoing Brief for the Respondents in Opposition upon Chevene Bowers King, Esquire, KING & PHIPPS, Counsel for Petitioner, Post Office Drawer 3468, Albany, Georgia 31706, by depositing same in the United States mail properly addressed with sufficient postage prepaid. I further certify that all parties required to be served have been served.

This _____ day of February, 1973.

MARION O. GORDON

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

RULE AND ORDER OF COURT
MOTIONS AND BRIEFS

There shall be no motion day

(a) Counsel shall submit with all written motions a brief of authorities (and written argument if desired), and where allegations of fact are relied upon, affidavits in support thereof.

(b) Respondent's counsel desiring to submit a response, brief, or affidavits, shall submit the same within ten days after service of Movant's motion and brief.

(c) Movant's counsel shall submit any desired reply brief, argument, or affidavits within five days after service of Respondent's response, brief, or affidavits.

(d) Movant and Respondent shall serve copies of all motions, briefs, affidavits (and argument if submitted) upon opposing counsel promptly, and shall file proof of such service.

(e) All motions shall be decided by the Court without a hearing unless otherwise ordered by the Court on its own motion, or in its discretion upon request of counsel.

SO ORDERED, this 2nd day of September, 1960.

/s/ T. HOYT DAVIS
T. Hoyt Davis
United States District Judge

FILED at 11:00 A.M.
JOHN P. COWARD
Clerk, U. S. District Court

/s/ W. A. BOOTLE
United States District Judge